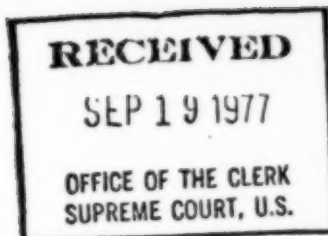


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IN THE  
SUPREME COURT OF THE UNITED STATES



OCTOBER TERM, 1976

NO. 76-6799

ORIGINAL COPY

GARY DAVID SMITH,  
PETITIONER

VS.

JAMES F. DIGMON, WARDEN,  
RESPONDENT

*Rep's Brief in opposition*

BRIEF AND ARGUMENT  
IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	<u>PAGE</u>
EARLIER OPINIONS IN THIS CASE . . . . .	1
JURISDICTION . . . . .	2
QUESTIONS PRESENTED . . . . .	3
CONSTITUTIONAL PROVISION INVOLVED . . . . .	3
STATEMENT OF THE CASE . . . . .	4
ARGUMENT . . . . .	5
CONCLUSION . . . . .	6
CERTIFICATE OF SERVICE . . . . .	7

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EARLIER OPINIONS IN THIS CASE

The affirmance of the convict's conviction is  
reported as:

Smith v. State, 57 Ala. App. 164, 326 So. 2d 692 (1975).

The denial of certiorari by the Alabama Supreme Court is reported as:

Smith v. State, 295 Ala. \_\_\_\_\_, 326 So. 2d 695 (1975).

The denial of the writ of habeas corpus by the United States District Court for the Northern District of Alabama is submitted as Appendix "D" to this brief.

The denial of a certificate of probable cause to appeal by the District Court is submitted as Appendix "E" to this brief.

So far as the Respondent knows, the Petitioner has neither sought nor received an order from the United States Court of Appeals for the Fifth Circuit granting or denying a certificate of probable cause to appeal.

#### JURISDICTION

The Petitioner contends that this Honorable Court maintains jurisdiction of the cause under 28 U. S. C. 2241-2255 and the Fourteenth Amendment to the United States Constitution.

#### QUESTIONS PRESENTED

1. Does a complaint by a State prisoner that incident to his trial in State court the trial judge allowed the convict's alibi evidence to be reread to the jury at their request present a Federal question within the meaning of 28 U. S. C. 2254 (a)?

2. Does a claim by a State prisoner convicted of rape that the prosecutrix's testimony concerning penetration was not corroborated present a Federal question within the meaning of 28 U. S. C. 2254 (a)?

3. Does a District Court err in denying a certificate of probable cause to appeal to a State prisoner who was denied a writ of habeas corpus on a petition that obviously presented no Federal question?

#### CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent specifically denies that this case involves any provision of the United States Constitution. However, the Petitioner is making his general claim under the Fourteenth Amendment of the United States Constitution.

### STATEMENT OF THE CASE

On January 10, 1977, the convict, a State prisoner, petitioned the United States District Court for the Northern District of Alabama for a writ of habeas corpus claiming that his United States Constitutional rights were violated by his imprisonment. The convict claimed that:

1. The State trial judge had erred in allowing the convict's alibi evidence to be reread to the jury at their request, and

2. The convict was convicted of rape on the uncorroborated testimony of the prosecutrix, as to penetration. On January 10, 1977, the District Court issued a show cause order to the State of Alabama. See Appendix "A".

The State's return moved to dismiss the petition, because neither of the convict's claims raised a Federal question within the meaning of 28 U. S. C. 2254 (a). See Appendices "B" and "C".

On February 11, 1977, the District Court denied the writ, finding that the petition presented no Federal question. See Appendix "D".

On February 23, 1977, the District Court denied the convict a certificate of probable cause to appeal. See Appendix "E".

So far as the Respondent knows, the convict has never applied to the Fifth Circuit for a certificate of probable cause to appeal.

### ARGUMENT

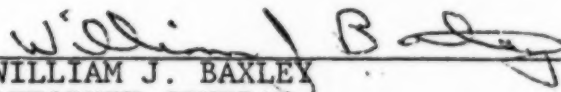
The Respondent will not take this Honorable Court's valuable time arguing the obvious. It is obvious that the petition presented no Federal question. (Should this Court wish argument on this point, the Respondent submits its memorandum in the District Court as Appendix "C" to this Brief.) It is equally obvious that the District Court correctly denied the writ and the certificate of probable cause to appeal.

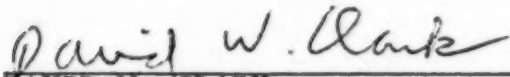
The instant petition is directed to the United States Court of Appeals for the Fifth Circuit, but so far as the Respondent knows, the Fifth Circuit has never issued an order. There is, therefore, nothing to review.

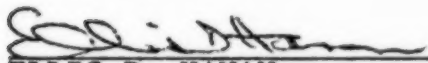
CONCLUSION

In conclusion, the Respondent respectfully submits that the writ is due to be denied and prays that the writ be denied.

Respectfully submitted,

  
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